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The Struggles of a Statute.

The case of Mondou *v.* N. Y., N. H. & H. R. R. Co., and cases therewith decided—see 17 VIRGINIA LAW REGISTER, p. 746—seems at last to end the struggles of the Federal Employer's Liability Act and place it amongst the settled laws of this country. And yet it has not reached this "high eminence" without a struggle, the history of which may not prove uninteresting.

The first act passed on this subject was in 1906. This act was held invalid as to interstate carriers in that it went beyond the power of Congress under the commerce clause by including all the employees of such carriers, and did not limit the act to employees engaged in such commerce, Howard *v.* Ill. Cent. R. R. Co., 207 U. S. 463, 52 L. Ed. 297, the majority of the court holding that this part of the act could not be separated from the provisions of the act as to interstate employees, so the entire act was void.

Justices Moody, Harlan, McKenna and Holmes dissented, holding that the attempted regulation of interstate employees could and should be separated from the other provisions of the act. Three of the concurring justices, Chief Justice Fuller and Justices Peckham and Brewer, did not concur with the idea that Congress could regulate the relation of master and servant in interstate commerce. The act was, however, held valid as to the District of Columbia and the territories in El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, the unanimous opinion of the Court being that the Congress had the right to pass such an act to apply in any portion of the country in which it was sovereign. The law-making power "mended its hold" in the act of 1908, setting out in separate sections the exercise of the power of Congress under the Commerce Clause in regulating interstate railroad carriers and its plenary powers over railroad carriers in the District of Columbia and other possessions

of the United States where the Congress exercised sovereign authority.

This act successfully ran the gauntlet of the lower Federal Courts in Zikos *v.* O. R. & N. Co., 179 Fed. 893, and Watson *v.* I. M. & S. R. Co., 169 Fed. 942, and finally was sustained by the Supreme Court in the cases referred to in the beginning of this article. The opinions in these cases were unanimous, though of the dissenting Judges in Howard *v.* Ill. Cent. R. R., supra, only Justices McKenna and Holmes remained upon the bench to take part in them, Justice Moody having retired and Justice Harlan being dead.

In the cases mentioned the act of April, 1910, amendatory of the principal act, also received the approval of the court, so that the doctrine of contributory negligence no longer applies as to an employee who may be killed or injured in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. The Supreme Court of the United States recognized the act of 1908 as amending the Safety Appliance Act in the case of Delk *v.* St. P. & St. F. R. Co., 220 U. S. 590. The only question which seems now to be open is as to what employment is in interstate commerce? It has been held in Zikos *v.* O. R. & N. Co., supra, that a section hand working on the track of a railroad over which both interstate and intrastate trains moved was employed in interstate commerce, yet in Taylor *v.* S. R. Co., 178 Fed. 380, it was held that a member of a railroad bridge gang injured while engaged within the scope of his employment in repairing bridges, though his duty required work in the repair of bridges in different states, was not engaged in interstate commerce. Of course these two cases are absolutely irreconcilable. Colasurdo *v.* C. R. R. of N. J., 180 Fed. 832, holds that a track walker injured whilst assisting in repairing a switch in a railroad yard and injured through the negligence of his fellow employees, was engaged in interstate commerce and could recover and that there was nothing in the statute which provided that the injury must arise from an act done in interstate commerce and that it was immaterial whether the train was engaged in interstate commerce or not. It seems to us that this last case and the Zikos case will probably be the

rule adopted by the Supreme Court when this question reaches it and that the Taylor case is absolutely wrong; and yet the language of the present Chief Justice in delivering the opinion in the case of Howard *v.* Ill. C. R. Co., supra, does not leave the matter free of a good deal of doubt. In this opinion the present Chief Justice says:

> "It remains only to consider the contention which I have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It seems that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution—in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, would destroy the authority of the states as to all conceivable matters which from the beginning have been and must continue to be under their control as long as the Constitution endures."

Practically the struggles of these statutes are at an end save as to this last question, and that it will be finally decided in a very short while, there can be very little doubt.

It is not without interest to observe that a measure so absolutely just and proper took about five years to be carried into effect. How much wrong and injustice was suffered in the meantime cannot well be estimated; but this is the result of our peculiar system of government and cannot well be helped. It is to be regretted that some constitutional method might not be adopted by which measures of this sort could be submitted to the Supreme Court by Congress as soon as passed and their constitutionality determined at once, and not be compelled to

await some action in the lower courts. Were this done—and we understand it is done in Massachusetts—much of the complaint of the law's delays might be obviated. Is it not worth considering?

Who Is to Blame?

In the very able annual address of the Honorable Elihu Root, delivered as president of the New York State Bar Association at Albany, January 19th, 1912, that distinguished gentleman uses the following language:

> "It is true that defects in procedure, that technicalities and delays which impede the course of justice here and elsewhere have tended to decrease the general respect of the community for every one concerned in the administration of the law, but I think this applies less to the courts themselves than it does to the bar, and justly so. It is the bar that makes up a great part of all our legislatures and is responsible for the stupid and mischievous legislation regarding procedure which hampers the courts in their efforts to do justice. It is the bar which, knowing all the facts and familiar with all the evils, insists upon the continuance of our methods to promote the immunity of criminals and the hindrance of justice to the point of denial. The primary fault and the primary duty of reform rest with us."

This statement by a great and distinguished lawyer, made to an assembly of lawyers, needs careful consideration at the hands of the profession. That it is true no one conversant with the history of reform in law can for one moment question. No great reform in law, either in procedure or in the *corpus juris*, has ever been accomplished except after long and hot opposition on the part of lawyers. Were the same amount of zeal and energy shown by the profession in combating law reform exhibited in fighting for it, there is no calculation of the amount of beneficial legislation we would now have on the statute books. But the lawyer is naturally intensely conservative and exceedingly timid when it comes to any great question of the readjustment of the law to meet changed conditions. Innovation to him means revolution—revolution means destruction, and yet the lessons of history are that innovation delayed means

revolution. Laws must be altered to meet changing conditions. As the French poet has said, "There is only one thing constant and that is change," and unless those who know best how to make laws undertake the reformation of them, then they will be reformed at the hands of those whose only object is change, regardless of consequences. And when the law is thus made by those who, owing to their lack of legal education, do not carefully consider results, statutes are framed so crude or inadequate as to compel the courts to decline to enforce them. The result is irritation and distrust of the tribunals of justice and the demagogue is quick to take advantage of it. It behooves our profession to wake up to the necessity of law reform; to bring pressure to bear upon our lawmaking bodies to remedy the many glaring inconsistencies and injustices in many of our laws, whether as made or as construed by the courts. The faults and failures of the law are beginning to be laid at our doors—and by no demagogue or wild doctrinnaire. We need self-inspection; we need active, energetic co-operation; we need wisdom and wakefulness, or we ourselves will suffer the most from the lack of it.

Master and Servant.

And in no branch of the law, leaving out procedure, is reform more needed than in the doctrine of master and servant. The Congress has in the act of 1908, heretofore alluded to, taken a gigantic step in the reform of the law as it was in this country. It is true that act applied to railway and transportation employees alone; but already in the various states of the Union the law is being adjusted to the changed condition of affairs and justice being meted out to those who heretofore suffered gross injustice owing to the long delay in reform of the law. The master and servant doctrine grew up during times when the relationship of employer and employed was a very intimate one. A man who employed ten men in manufactures or trades was rare; he who employed fifty almost unknown. Necessarily the superintendence of the master over his servants and the relationship between servants themselves was of the most intimate character, and the idiosyncracies of each

were well known—or should have been well known—to both master and servants. The master was in daily, almost hourly, contact with his servants; the servants thoroughly acquainted with one another. Vast and complicated machinery was well nigh unknown and accidents easily avoided and the results of carelessness far less serious. It was during such a condition of affairs that the law of master and servant developed, and remained practically the same, and indeed in many ways remains practically the same today, though the conditions are as far apart as the East is from the West. To govern an accident on a transcontinental railway in which the track-walker was injured by negligence of the engineer, by the same rule which applied to the driver of a stage coach and a stable hand; or to settle the rights between the joint stock owners of a cotton mill working 5,000 men, women and children with modern methods and machinery, and an employee injured in the mill, by the law which governed a master weaver and one of his ten hand-loom workmen, is like calculating the procession of the equinoxes with an abacus, or laying off the Panama Canal with a three foot rule. And yet that is what we have been doing, and in some instances still do, in the courts of this country. Can we wonder at the unrest of the employed and those unlearned in the law, who do not understand that the courts cannot change the law or adapt their decisions to changed conditions?

The giant may murmur and grumble for awhile, but learning his strength will by and by use it like a giant. Witness the Employer's Liability Act in Great Britain—probably one of the most socialistic pieces of legislation ever enacted and which is being enforced by the courts to an extreme we can hardly realize in this country.

The Rule in Virginia.

The rule in Virginia differs practically in no way from that in the other states which have not adopted an Employer's Liability Act. The courts of this Commonwealth are confined to the narrow limits of the law as it is—not as it ought to be—and therefore in the decision in Riverside & Dan River Cotton

Mills *v.* Carter, March 14th, 1912, our Supreme Court of Appeals did not err.

And yet is the law as there laid down consistent with exact justice? An employee in an illy-lit room, whose duty it was to oil machinary, noticed the lack of a covering to certain cog-wheels which rendered the discharge of his duty very dangerous. He *called the attention* of the foreman to this defect and the *foreman promised to have it corrected.* Nothing was done for ten days and the request was repeated with an additional one that more light be given. Two weeks later this request was repeated and a new promise made that both requests would be granted. These requests were repeated time and again, promises made and broken. The employee kept at his work and finally was caught in the cog-wheel and his arm torn and lacerated.

He sued, obtained judgment in the lower court and that judgment was reversed by the Supreme Court on the ground that the employee assumed the risk, and that, after waiting a reasonable time to have the defect remedied, he should have left his employ.

Now that this is sound law as the law stands no one can deny. But that it is just as between man and man, between employer and employee, is quite another question. "Quit your job or take your life in your own hands" the law says, unmindful of the fact that

> "You take my life,
> When you take the means whereby I live."

On one side risk; on the other well nigh absolute certainty of suffering from loss of employment. We have very little doubt but that in this very case the cruel cog-wheel which crushed this man's arm seemed not half so cruel as the stern cog-wheels of necessity, requiring him to provide food for wife and weans which kept him at his work. No employer ought to be allowed to subject his employee to such a risk under such circumstances. The law should rigidly enforce a reasonably safe place in which the employee is to work, should put all reasonable safe-guards around the machinery at which he has to work, and where attention has been called to a defect and the defect not remedied within reasonable time, then such neglect on the part of the employer ought to be held equivalent to

a crime and he held responsible for any injury resulting from this defect, regardless of any negligence or assumption of risk by the employee.

Instructions.

If ever the defects in our present practice in regard to giving instructions was exemplified in its worst shape it is in the case of the Southern Railway Company *v.* Childrey, etc., decided by our Supreme Court of Appeals, on March 14th, 1912. In this case the lower court gave an instruction as follows:

> The court instructs the jury that it was the personal duty of the defendant company to exercise ordinary care and diligence to furnish to and provide for the plaintiff sound and safe brakes and appliances with which to operate and brake the car in question, and to this end it was equally the duty of the defendant to exercise ordinary care to inspect and examine the brakes and appliances from time to time to discover and repair defects in them, and that these duties could not be assigned or delegated by the defendant to any of its employees so as to relieve the defendant of liability; and if the jury believe from the evidence that the said brake was in a defective or unsafe condition, and that the defendant knew, or by the exercise of ordinary care could have known that said brake which it provided for the use of the plaintiff on the car in question was defective or unsafe and that it did not exercise ordinary care to discover or repair the same, and the plaintiff was thereby injured without negligence on his part, then the defendant is liable for such injury and they will find for the plaintiff.

This instruction is substantially identical with an instruction approved by our court in Norfolk & Western Railway Company *v.* Ampey, 93 Va. 108, but which the court through Keith, president, proceeds to show is now in conflict with every decision of the court touching upon the question from that time down to the most recent case of the Southern Railway Company *v.* Foster, 111 Va. 763. The court calls attention to the petition for a writ of error in the Norfolk & Western R. Co. *v.* Ampey Case which we cannot suppose was before the lower court when it gave the instruction No. 1, and quoting from Judge Riley's opinion in that case says that "It is conceded that the instruc-

tion correctly propounds the law." Under these circumstances it is not hard to understand why the lower court gave the instruction, and yet, as the court very plainly shows, time and again since 93 Va. instructions have been given practically overruling the instruction in Norfolk & Western Railway Company *v.* Ampey, supra, but not calling the attention of the profession to the fact that it was practically overruled. Indeed, in the case of McDonald *v.* Norfolk & Western Railway Company, 95 Va. 99, Norfolk & Western Railway Company *v.* Ampey is quoted with approval, and yet it now stands as absolutely disapproved and not as law any longer. We think it can be safely said that there is hardly a personal injury case which comes to a hearing before the Supreme Court of Appeals of our State that is not reversed upon an instruction erroneously given or refused. Is it not time that some great law writer like Stephens should attempt to put in the shape of a code, if possible, the law as to personal injuries and master and servant, or else have the courts devise some plan by which our present system of instructions can be changed and the lower courts allowed to charge without the probability of being reversed by giving instructions approved in one case, which seem to fit the facts in another but which the Appellate Court quickly discovers have no application in the case at bar? The matter is becoming almost farcical if it were not so serious.

Buildings for the Uses of Banks.

In the case of Wingert *v.* the First National Bank of Hagerstown the Supreme Court of the United States on March 11th, 1912, has rendered an opinion which we think will be of much interest to the banking corporations of this State, whether national or otherwise. A national bank in the city of Hagerstown, by a resolution of its board of directors, directed the pulling down of its bank building and the erection of a six-story building in its place, the first floor to be used for banking purposes, the other floors to be let for offices. Wingert, who was a holder of stock in the bank, filed a bill of injunction to prevent the directors and the contractor

employed by them from pulling down the building and making the other erection there, on the ground that the indicated construction was *ultra vires* and commercially unwise. The circuit court dismissed the bill on the ground that in the absence of bad faith it would not revise the judgment of a majority of the directors on the question of policy and that a national bank lawfully might turn its building to the best account by adding upper stories for offices to let. It has been almost the universal practice, certainly in this State, for national banks and other banks to add to their revenue by renting rooms in their buildings to other tenants, but the question has been raised not in the courts but several times in the daily press and in discussions amongst lawyers, as to the right of a bank to do this—especially a national bank. This case settles the matter, and it settles it, as we take it, in the correct manner.

Taxation of Public Utilities.

The present auditor of the State of Virginia has raised a very important question in directing the Commissioners of the Revenue to assess for taxation gas and water works of municipal corporations which are run by the various cities in the State and which are supposed to be a source of profit to the municipalities. The question of the right of taxation of these public utilities is one not at all free of doubt, and while a good many of the newspapers of the State are disposed to find fault with the auditor, we are strongly inclined to think that the matter ought to be brought to a test in the courts of the State. Gas and water works are not properly held by municipal corporations for strictly governmental purposes. Of course all the property of a city held for governmental purposes is non-taxable, but it is a very serious question as to the status of property which the city acquires and utilizes for profit even though its object is one of public utility. Coming in competition as the municipality does with private water, gas and electric companies, it is certainly a proposition open to argument that they should stand on the same basis with these private corporations as to the taxation of property used in this way.

In the case of Flint *v.* The Stone-Tracy Company, 220 U. S. 106, 55 L. Ed. 389, the Supreme Court of the United States says:

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying such enterprises are nevertheless private companies, whose business is prosecuted for private accumulation and advantages. For the purposes of taxation they stand upon the same footing as other private corporations upon which special privileges have been conferred."

And in the case of South Carolina *v.* United States, 199 U. S. 437, 50 L. Ed. 261, the Supreme Court held that when a State acting within its lawful authority undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States.

We do not think, therefore, that the instructions of the auditor to the commissioners are to be criticised adversely. The question is one that should certainly be decided by the Supreme Court.